Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

PAULA JO GRANT,

Plaintiff/Petitioner

v.

LONE STAR COMPANY, ET AL.,

Defendants

and

MITCHELL L. MURRAY,

Defendant/Respondent

Petition for Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

1. Whether in a Title VII gender discrimination suit based upon sexual harassment a judgment for back pay against an individual employee/agent of the corporate employer is consistent with the intent of Congress.

2. Whether in a Title VII gender discrimination suit based upon sexual harassment the trial court's equitable power, as expressed in the statute, extends to the imposition of liability for back pay against an individual corporate employee/agent who is a principal wrongdoer.

3. Whether this Court should resolve a conflict in decisions by the Courts of Appeals on the question of whether an individual employee/agent can be held responsible for back pay as a remedy in a Title VII case.

PARTIES TO PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

1. Paula Jo Grant Landry, Plaintiff/ Appellee.

2. Mitchell L. Murray, Defendant/ Appellant.

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OPINIONS BY OTHER COURTS

The opinion of the United States Court of Appeals from which is the subject of this Petition was rendered on May 27, 1994, and is reported as ***Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994)**.

A judgment was entered in Petitioner's suit styled ***Grant v. Lone Star Co., et al.***, on September 23, 1992 by the United States District Court for the Southern District of Texas in Civil Action No. H-89-2018. The judgment was subsequently modified by Order of the court entered on December 18, 1992.

The findings of fact and conclusions of law of the United States District Court for the Southern District of Texas in Civil Action No. H-89-2018 were pronounced orally by the court on June 18, 1992.

All of these opinions and findings are reproduced in the Appendix to this Petition.

JURISDICTIONAL GROUNDS

Petitioner seeks review of a judgment of the Court of Appeals for the Fifth Circuit entered on May 27, 1994. No Petition for rehearing was filed.

Jurisdiction in the trial court was based upon Title 28, United States Code, Sections 1331 and 2201, and Title 42 United States Code, Section 2000e-5(f)(3), with the trial court exercising pendent jurisdiction over claims arising under Texas law. Jurisdiction in the Court of Appeals was under Title 28, United States Code, Section 1291.

This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1254(1) and 2101(c). There is a conflict of decisions among the circuit courts of appeal on the issue decided by the court below.

STATUTORY PROVISIONS

Section 701(a) of the Civil Rights Act of 1964, Title 42, U.S.C., §2000e(a) provides:

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

Section 701(b) of the Civil Rights Act of 1964, Title 42, U.S.C., §2000e(b) provides in pertinent part:

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar

weeks in the current or preceding calendar year, and any agent of such a person,. . . .

*** * ***

Section 706(g) of the Civil Rights Act of 1964, Title 42, U.S.C., §2000e-5(g) provides in pertinent part:

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems

appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

* * *

STATEMENT OF THE CASE

The Course of Proceedings in the Courts Below

Plaintiff below, PAULA JO GRANT, [1] who is Appellee in this Court, filed a complaint in August 1988 with the United States Equal Employment Opportunity Commission (hereinafter "EEOC") against her employer, Lone Star Company, a liquor distributor. The complaint charged that Petitioner was the subject of sexual harassment and gender discrimination in the workplace in violation of Title VII of the Civil Rights Act of 1964, as amended, **Title 42, United States Code, Sections 2000e *et seq*.** After conciliation efforts failed, Grant timely initiated a suit

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[1] The Plaintiff married during pendency of the proceeding, but the case has retained its original style. Judgment was entered by the trial court in favor of PAULA JO GRANT LANDRY. The Plaintiff, who is Petitioner in this Court, will be referred to as "Grant"

in the United States District Court for the Southern District of Texas, Houston, Division, against the corporation, and several individual officers, directors, stockholders, and supervisors, [2]/ including Mitchell L. Murray, who was the Appellant in the court below. The suit sought judgment against all defendants under Title VII of the Civil Rights Act, as amended, and under the tort laws of the State of Texas. [3]/

Approximately sixteen months after the suit was initiated, the corporate employer, Lone Star Company, filed for relief under the bankruptcy laws in the United States Bankruptcy Court for the Northern District of

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[2]/ The named defendants were Lone Star Company, B. L. Watson, M. A. Petsch, Edward C. Thomas, Jay Clayton, Ben A Lanford, Jr., Mitchell L. Murray, Keith Overstreet, William P. Middleton, Dennis Thomlinson, Tombo S. Faver and Quality Beverage Company. Quality Beverage Company was dismissed by the trial court on its motion.

[3]/ This case arose and was filed prior to the 1991 Civil Rights Act, but was tried subsequent to the passage of those amendments to Title VII.

Texas. Two individuals against whom the plaintiff sought to impose liability, William P. Middleton and Keith Overstreet, also filed bankruptcy proceedings in the Southern District of Texas and discharged the plaintiff's claim. The plaintiff's suit was dismissed by the trial court as to the corporate employer and the two bankrupt individuals, but proceeded to trial against the remaining individuals.

The tort claims were tried to a jury, which found in favor of the defendants, [4]/ and the Title VII claim was tried to the Honorable Sim Lake, United States District Judge for the Southern District of Texas, who found in favor of Plaintiff Grant and imposed

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[4]/ The panel opinion erroneously states that "[a]fter a jury trial, all defendants but Murray were found not liable." (Appendix, A-5) The jury found in favor of all the remaining individual defendants on the tort claims asserted on the basis of Texas law. The trial court found two of the eight remaining individual defendants liable under Title VII for sexual harassment.

liability for back pay and attorney's fees on two individuals, Mitchell L. Murray and Tombo S. Faver. Defendant Murray timely pursued an appeal; Defendant Faver did not appeal the judgment entered against him.

On Murray's appeal to the United States Court of Appeals for the Fifth Circuit, the panel, by decision dated May 27, 1994, reversed the judgment against Mitchell Murray for back pay and attorney's fees. ***Grant v. Lone Star Co., et al.*, 21 F.3d 649 (5th Cir. 1994)**(Appendix A-1 *et seq.*). The panel held that "individuals who do not otherwise qualify as an employer cannot be held liable for a breach of title VII." ***Id.* at 653.** (Appendix A-18) The panel found no Congressional intent to hold natural persons who are not employers liable for back pay awards. ***Id.*** (Appendix A-17,18)

Statement of Facts

The Lone Star Company was a corporation, the sole business of which was wholesale liquor distribution. The corporation was based in Dallas, Texas, with branch offices in several Texas cities, including Houston. The plaintiff below, Paula Jo Grant (Landry), was employed as an on-premise sales representative for a period of about four years. In that capacity she was engaged in the promotion of liquor and distilled spirits at restaurants and bars, for which she was paid a salary and bonuses, plus expenses. Less than one year after she was employed in the Houston Branch Office, Defendant Mitchell L. Murray, a vice-president, director and shareholder of Lone Star Company, was transferred to Houston as the Branch Manager. Mitchell had the power to hire and fire personnel in the Houston Branch Office, and had disciplin-

ary responsibility for the employees in that office, as well as authority to run the everyday operations of the business. (Findings of Fact and Conclusions of Law, Appendix A-25)

During plaintiff's employment, supervisors named as individual defendants below, including Defendant Murray, and fellow employees who were not named as defendants in Grant's suit, engaged in conduct which the trial court found to be unlawful sexual harassment. The trial court specifically found that Defendant Murray personally made sexual jokes and belittled women, engaged with other employees in sexually harassing conduct, and was unresponsive when plaintiff complained to him. The court also found that Murray subjected the plaintiff to verbal harassment, and permitted visitors to the premises to make sexually explicit jokes,

participated directly in acts of sexual harassment and condoned and encouraged such acts by other workers. Trial evidence included specific episodes involving physical contact between plaintiff and Defendant Murray, sexually explicit cartoons, jokes and comments made about plaintiff, and photographs of nude women in sexually suggestive postures displayed on the walls of the sales room at the Houston Branch Office. The court concluded that there was a pervasive atmosphere of sexual discrimination against women in the Houston Branch Office which constituted a hostile work environment affecting a term or condition of plaintiff's employment in violation of Title VII. (Findings of Fact and Conclusions of Law, Appendix A-24 *et seq.*)

On August 30, 1988 Plaintiff filed a charge of discrimination with the Equal

Employment Opportunity Commission office in Houston, listing only the corporation, Lone Star Company, in the charge. [5]/ In May, 1989, the principal assets of Lone Star Company were sold to Quality Beverage Company, a competitor. Defendant Murray, along with all other officers, directors and stockholders, was present at the meeting where the decision was made to sell the corporate assets. Defendant Murray and nine other officers, directors, stockholders and supervisors were individually named as defendants in the suit instituted in June, 1989 by Plaintiff. In October, 1990, while defending Grant's suit, Lone Star Company initiated a liquidating bankruptcy proceeding. Trial testimony indicated that a skeleton crew of

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[5]/ Murray was named in Plaintiff's voluminous affidavit given to the EEOC in support of the formal Charge of Discrimination. The trial court denied admission of this affidavit in evidence at trial, but Defendant Murray has never contested that he was named in it.

employees was retained after the sale of assets to Quality Beverage Company in order to collect outstanding accounts receivable of Lone Star Company which were pledged to a creditor until the bankruptcy proceeding was filed.

Subsequent to the filing of her EEOC complaint Petitioner Grant felt that she was subjected to retaliatory conduct by the individuals whom she had named in the EEOC affidavit. On October 10, 1988 she submitted a written resignation, effective October 14, 1988. The trial court found that her resignation was involuntary. (Findings of Fact and Conclusions of Law, Appendix A-32)

ARGUMENT AND AUTHORITIES ON REASONS FOR GRANTING A WRIT OF CERTIORARI

PETITIONER'S FIRST ARGUMENT

A judgment for back pay against an individual employee/agent of an employer is consistent with the intent of Congress.

The intent of Congress in enacting Title VII of the Civil Rights Act of 1964 and its amendments, **Title 42, United States Code, Sections 2000e *et seq.*,** was to provide broad remedial relief for discriminatory practices, arming the courts with full equitable powers in order to secure "complete justice" and "necessary relief." ***Albemarle Paper Company v. Moody*, 422 U.S. 405, 418 (1975).** The Congressional purpose to "make whole" the victims of unlawful discrimination is evident from the legislative history. ***Id.* at 419.**

Back pay is but one of the remedies included in the purview of Title VII. The restoration of lost wages for a person whose

employment has come to an end due to unlawful conduct in the workplace is consistent with the Congressional purpose to "make whole." The issue presented by the decision of the United States Court of Appeals for the Fifth Circuit is whether a judgment directing that an offending individual restore wages lost as a result, in whole or in part, of that individual's discriminatory conduct is consistent with the Congressional intent expressed in Title VII.

There is no specific intention stated in the Act or in any of its amendments to limit the application of the back pay remedy. Application of any equitable remedies should be limited only by the particularities of any given case before the Court, and should not be subject to categorical exclusions from the panoply of tools with which the district court may fashion an appropriate remedy. In

the case at bar, the back pay remedy was not only appropriate, it was virtually the only remedy available to the Plaintiff, because the corporate employer, acting through its officers, directors and shareholders, including Defendant Murray, was no longer doing business. Indeed, by the Petitioner Grant's claim came to a judgment, the corporation no longer had any assets with which to conduct business or to provide a remedy for the employee it had wronged. By excusing the corporate agent from liability, the Fifth Circuit, as well as the Ninth Circuit, has created an exception to the remedies available to a claimant under Title VII.

The Fifth Circuit concluded that Congress did not intend back pay liability to extend to natural persons who are not employers because it is illogical to require the courts to treat some employees as both an

employer and employee, and because employers have the ability to discipline the employee. **21 F.3d at 653.** (Appendix A-17) This conclusion is erroneous for several reasons.

First, the trial court specifically found that defendant Murray had the authority to discipline employees. (Findings of Fact and Conclusions of Law, Appendix A-25) This authority gave him the power to effectuate all policies of the corporation, and in the case at bar, the responsibility not only to refrain from discriminatory conduct himself, but to correct unlawful conduct by others. With respect to the Houston Branch Office, Murray ***was*** the corporate employer.

Second, the Fifth Circuit mistakenly adopted the Ninth Circuit's rationale regarding small employers. Small employers are excluded from coverage by Title VII, not to protect them from the costs of litigation,

but to protect them from suit for hiring relatives and family friends. *See* ***Armbruster v. Quinn*****, 711 F.2d 1332, 1337 n.4 (6th Cir. 1983)**(citing Congressional Record).

Third, the imposition of back pay liability should not depend solely upon a distinction between employer and employee. A construction of the statute which permits an employee/agent to be responsible for lost pay is no more illogical than holding a labor union liable for back pay when it serves only as a bargaining representative, *see* **e.g., *Carey v. Greyhound Bus Co., Inc.*, 500 F.2d 1372, 1379 (5th Cir. 1974),** or making an employment agency responsible for lost pay when it has no supervisory authority at all. ***Pegues v. Mississippi State Employment Service*****, 899 F.2d 1449, 1453 (5th Cir. 1990).** By focusing solely on *de facto* employers, the Fifth Circuit undervalued the scope of the

Congressional intent in Title VII. The remedies of Title VII are intended to be applied to any employer, as identified in the statute.

Title VII should be read in a way which effectuates its plain meaning. The definition of employer in Section 701(b) of the Act includes "any agent" of a person engaged in an industry affecting commerce who has fifteen or more employees. **Title 42, United States Code, Section 2000e(b).** To hold that a corporate agent is not liable as an employer, when he is included in the definition of employer, effectively amends the statute and frustrates its plain intention. ***Cf., Price Waterhouse v. Hopkins*, 490 U.S. 228, 245 n.10 (1989)(plurality opinion).** One district court has commented that it is inconceivable that Congress would have intended to immunize from liability "the very persons who have

engaged in the employment practices which are the subject of the action." ***Dague v. Riverdale Athletic Ass'n*, 99 F.R.D. 325, 327 (N.D.Ga. 1983).** The Fifth Circuit in ***Harvey v. Blake*, 913 F.2d 226, 227 (5th Cir. 1990),** reaffirmed a prior holding that supervisory employees exercising traditional employer's rights, such as hiring and firing, are employers within the meaning of Title VII, at least for the purpose of holding the corporate employer responsible for the discriminatory conduct of its employee/agent. That same appellate court has now held that those "employers" are exempt from personal responsibility for their conduct, that the statutory definition of employer, which includes such an employee/agent, works only to hold the corporate employer liable. This holding in effect grants employee/agents an immunity which is not expressed directly in Title VII,

and effectively denies anyone in plaintiff's position a remedy for wrongful conduct that Congress intended to correct in a variety of ways.

PETITIONER'S SECOND ARGUMENT

The equitable power of the district court extends to the imposition of back pay liability against an individual employee/agent who is a principal wrongdoer in a Title VII case.

The opinion of the court below does not discuss the scope of the district court's remedial powers in a Title VII case. The focus of the opinion is principally on liability and damages. The origin of those terms is in the realm of *legal* remedies, and becomes confusing when the proper inquiry should be the *equitable* remedies which will restore the wronged employee, as nearly as possible, to the place she would have occupied but for the wrong committed against her. ***Albemarle Paper Company v. Moody, supra*, at 418-19.**

The district court's equitable power in discrimination cases is broad. *Id.* Indeed, the statute itself instructs the courts to

use certain enumerated remedies, including back pay, or "any other equitable relief as the court deems appropriate." **Title 42, United States Code, Section 2000e-5(g).** Thus Court can appropriately order a wide variety of actions to be taken by individuals within the corporate structure. ***See e.g., Cuesta v. Texas Dep't of Criminal Justice*, 805 F.Supp. 451 (W.D.Tex. 1992); *Sandoval v. Pagano*, 763 F.Supp. 1087 (D.Colo. 1991) and *Pree v. Stone Engineering Corp.*, 607 F. Supp. 945 (D.Nev. 1985).** A corporation can only act by its agents, and the effectuation of equitable remedies must be undertaken by individual employees, supervisors, officers and directors. Had there been the opportunity for continued employment, the district court could have ordered Defendant Murray to take specific actions at the workplace to eliminate not only his own discriminatory conduct,

but all discriminatory practices at the Houston Branch Office of Lone Star Company. There is no rational distinction between ordering a remedy which involves an invasion of a wrongdoer's pocketbook and ordering a remedy which involves an invasion of his daily supervisory discretion.

Petitioner suggests that under the general broad equitable powers of a district court an appropriate remedy could be fashioned against an employee/agent, even if he were not included within the statutory definition of employer. The statute, however, specifically includes any agent of a person which comes within the definition of "employer." **Title 42, United States Code, Section 2000e(b).** The trial court in this case found that Mitchell L. Murray was an employer, within the meaning of the Act. (Appendix A-33) The court further found that Murray

"clearly meets th[e] test" of an agent of an employer. (Appendix A-34)

The court of appeals failed to grasp the true significance of the employee/agent dichotomy. Because of his role as an agent of the corporation Murray had all of the powers of the corporate employer. He could bind the employer by his conduct, and should in turn be bound himself by his own actions. The Act unequivocally states that back pay is payable by an employer "responsible for the unlawful employment practice," **Title 42, United States Code, Section 2000e-5(g),** and in this case the only equitable remedy available to the subject of discrimination was back pay by one who wore the hat of both employee and employer.

Murray, however, was more than a mere agent of the corporation. He was a part owner/stockholder, an officer and a corporate

director. Although the appellate court was reluctant to treat individuals as both employers and employees, in certain situations, such as the case at bar, some individuals play both roles. Almost certainly that will be the case any time there is a closely-held corporation, where the principal stockholder is also the proprietor, chief executive officer and/or supervisor of more than twenty-five employees. *See e.g., U.S. E.E.O.C. v. AIC Security Investigations, Ltd.*, **823 F.Supp. 571 (N.D.Ill. 1993).** The equitable power of the trial court must include the option of assigning responsibility for back pay to one so closely tied to the corporate employer. The holdings of the Fifth and Ninth Circuit courts unduly limit the power of the district court to fashion a remedy appropriate to the circumstances of any given case before it.

PETITIONER'S THIRD ARGUMENT

The decision of the Court of Appeals for the Fifth Circuit is in conflict with the decisions of other appellate courts on this issue.

Other courts have found equitable remedies, including imposition of monetary liability, to be appropriately ordered against individual employees of an employing entity. The decisions of the Fifth Circuit in the case at bar and the Ninth Circuit in ***Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1983), *cert. denied*, ___ U.S. ___ (1994-)**, are in conflict with the decisions of other courts on the issue of individual liability for back pay.

In ***Glus v. G. C. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977)** (relied upon by Defendant Murray before the appellate court) the Third Circuit fashioned a four-part test centered on the identity of interests between employer

and agent in considering the imposition of monetary liability against an individual. A similar test was adopted by the Tenth Circuit in ***Romero v. Union Pacific R.R.*, 615 F.2d 1303, 1311 (10th Cir. 1980)** and the Seventh Circuit in ***Eggleston v. Chicago Journeymen Plumbers Local Union No. 130, U.A.*, 657 F.2d 890, 905 (7th Cir. 1981)**. The Sixth Circuit and the Eighth Circuit use such a remedy when there is "substantial identity" between the individual and the corporation, but neither has held that "substantial identity" requires ownership, in whole or in part, as Defendant Murray possesses in the case at bar. ***Romain v. Kurek*, 836 F.2d 241 (6th Cir. 1987); *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986); *Greenwood v. Ross*, 778 F.2d 448 (8th Cir. 1985); *Sedlacek v. Hock*, 752 F.2d 333 (8th Cir. 1985)**. The Fourth Circuit holds any individual liable for back pay who

personally participates in wrongdoing while serving as a supervisor exercising significant control over hiring, firing and conditions of employment. ***Paroline v. Unisys Corp.*, 879 F.2d 100, 104-06 (4th Cir. 1989), *modified on other grounds*, 900 F.2d 227 (4th Cir. 1990).**

This Court has not addressed the issue head on, but has affirmed an award of attorney's fees against an individual without comment in ***New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).** A myriad of district courts have found individual liability to be equitable and appropriate, most frequently where there has been some sort of personal participation in the wrongful conduct, at least to the extent of deliberate oversight. ***See e.g., Showalter v. Allison Reed Group, Inc.*, 767 F.Supp. 1205 (D.R.I. 1991); *Hendrix v. Fleming Companies*, 650**

F.Supp. 301 (W.D.Okla. 1986); and *Robinson v. Jacksonville Shipyards*, 760 F.Supp. 1486, 1527 (M.D.Fla. 1991)(relied on by Defendant Murray at argument before the appellate court). Of particular interest is a decision from the United States District Court for the Southern District of New York, where a third party who was neither the employer, nor an officer or agent of the employer, was held liable for lost pay. The third party took discriminatory action which caused the employer to terminate the complainant. The court held back pay liability against the third party to be an appropriate remedy under all the facts of the case. ***Postema v. Nat'l League of Professional Baseball Clubs*, 799 F.Supp. 1475, 1482-83 (S.D.N.Y. 1992).**

In the case at bar, where there was an identity of interest between Murray and Lone Star Company, no injunctive relief would have

been complete without reference to his responsibilities to comply with the law; equity demands that complete relief be afforded to this Plaintiff by reinstating the judgment for back pay and attorney's fees against Defendant Murray.

CONCLUSION

The imposition of monetary liability against an individual agent of a corporate employer who has engaged in wrongdoing against the plaintiff is consistent with the intention of Congress in enacting the equitable remedies provisions of Title VII. The statute should be read broadly, as the powers granted to the trial court are broad, in order to fashion a remedy which is appropriate to the facts of an individual case.

Further, the equitable power of the district court is broad enough to include the remedy of monetary liability against an individual agent who has a strong identity of interests with the corporate employer and who has personally committed discriminatory acts. In the case at bar, the panel erred in re-

versing the judgment as to Murray. [6]/ The combination of ownership interest, executive position, and supervisory power make it appropriate to impose personal liability on Mitchell L. Murray. In view of all the facts of the case below, including the lack of remedies against the corporate employer, the "make whole" intention of Congress is best realized by reinstating the judgment of the trial court below.

Respectfully Submitted,

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August 25, 1994

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[6]/ The panel also erroneously RENDERED judgment in favor of Lone Star Company, which is no longer a party to this proceeding and has never appeared before this Court.

APPENDIX

Paula Jo GRANT, Plaintiff-Appellee

v.

LONE STAR COMPANY, B.L. Watson, et al., Defendants,

Mitchel L. Murray, Defendant-Appellant.

No. 93-2123

United States Court of Appeals,
Fifth Circuit

May 27, 1994.

Appeal from the United States District Court for the Southern District of Texas.

Before KING and SMITH, Circuit Judges, and KENT,* District Judge.

JERRY E. SMITH, Circuit Judge:

Mitchel Murray appeals a judgment finding him liable for backpay damages under title VII of the Civil Rights Act of 1964 for sexually harassing Paula Jo Grant. Because title VII does not provide for liability

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* District Judge of the Southern District of Texas, sitting by designation.

against individual employees who do not otherwise qualify as employers, we reverse and render.

I.

A.

Grant began work with the Lone Star Company ("Lone Star") as a sales representative on March 26, 1984. She worked at the Houston branch from then until her resignation on October 14, 1988., Mitchell Murray became Branch Manager of the Houston branch of Lone Star on May 1, 1985.

The district court found that while at the Houston branch, Grant was subject to frequent sexual harassment, including sexually explicit jokes and cartoons, comments about her body, clothing, and personal appearance, lewd comments, and suggestive noises, all of which had the effect of making her the center of male attention because of

her sex. Sexually explicit language, jokes, and remarks were directed at other female employees at her office. Pictures of nude women, including an employee, were posted on the office walls and were passed around among employees, including supervisors. With Murray's approval, visitors were permitted to make sexually explicit jokes at sales meetings.

Grant was subjected to sexually suggestive conduct by male employees and descriptions of sexual conduct by fellow employees and supervisors. She also was subjected to crude, hostile, and intimidating remarks that were belittling to women in general, and to her in particular. The district court also found that Murray participated in these activities and that the behavior of Murray and other defendants had the effect of creating a hostile work environment that affected

a term or condition of Grant's employment in violation of title VII.

B.

In August 1988, Grant filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). The only listed respondent in the discrimination charge was Lone Star. Murray was not listed as a respondent and was not identified in the body of the charge.

Grant obtained a right-to-sue letter and filed suit in June, 1989, against Lone Star, B.L. Watson, M.A. Petsch, Edward C. Thomas, Jay Clayton, Ben A. Lanford, Jr., Murray, Keith Overstreet, William P. Middleton, Dennis Thomlinson, Tombo S. Faver, and Quality Beverage Co., Inc. Grant claimed that defendants discriminated against her because of her sex, subjected her to sexual harassment and a hostile work environment, and

retaliated against her for having opposed unlawful employment practices and for having filed a charge and for having participated in an investigation or proceeding in violation of title VII. She also asserted a number of violations of state tort and contract law. She sought recovery from the principal stockholders of Lone Star; injunctive relief against Quality Beverage Company, which had purchased the assets of Lone Star; and backpay, reinstatement, compensatory and punitive damages, and attorneys' fees.

After a jury trial, all defendants but Murray were found not liable. The court held that Murray was liable for sexual harassment not as an employer, but personally because he participated directly and engaged in acts in addition to condoning and encouraging the acts of other workers that contributed to a hostile working environment. The court

ordered Murray to pay Grant backpay of $5,905 and directed Murray and Faver to pay $62,500 in attorneys' fees and $4,678.74 in expenses.

II.

Murray contends that the district court erred by rendering judgment against him in his individual capacity for backpay damages under title VII.[1] He contends that as a matter of law backpay awards cannot be assessed against individuals who do not otherwise qualify as employers.[2]

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[1]. Murray also contends that he cannot be held liable as a matter of law because he was not named in the charge of discrimination filed with the EEOC. We need not reach this issue.

[2]. Grant contends that Murray is estopped from contesting the issue of individual liability because he admitted otherwise at trial. Judicial estoppel applies where a party tries to contradict in a second lawsuit his sworn statement in previous litigation. It is intended to protect the integrity of the judicial process, avoid inconsistent results, and prevent litigants from playing fast and loose in order to secure an advantage. *See United States ex rel. Am. Bank v. C.I.T. Constr.*, 944 F.2d 253, 258-59 (5th Cir. 1991); *Brandon v. InterFirst Corp.*, 858 F.2d 266, 268

Under title VII, an "employer" may not discriminate on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2. An "employer" includes any "person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks. . . ." *Id.* § 2000e(b). For purposes of title VII, "The term 'person' includes one or more individuals. . . ." 42 U.S.C. § 2000e(a). Because Murray is not an "employer" under title VII, the district court erred by holding him individually liable for harassing Grant.

A.

In this circuit, we have addressed only the issue of whether a *public* employee should

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(5th Cir. 1988). Murray denied the propriety of individual liability in the amended pre-trial order, his amended answer, and his motion for directed verdict. Thus, judicial estoppel is not appropriate.

be exempt from liability for employment discrimination. We have refused to impose liability for backpay on individual public employees. Grant offers no persuasive argument why Congress would not have intended to protect private employees, as well, from individual title VII liability.[3]

In *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084 (5th Cir. Unit A July 1981), this court held that the board's maternity leave policy violated title VII, but refused to impose liability for backpay on the individual defendants because it could "find no authority for holding public officials personally liable for backpay under Title VII," *id.* at 1099, and its "research [had] failed to uncover a single case in which a public official has been held personally liable for

---

[3] Presumably private employees still could be liable for violations of state tort and contract law, such as intentional infliction of emotional distress.

backpay under Title VII," *id.* at 1099 n. 19. In particular, the court noted that title VII makes "employer[s]" responsible for backpay damages, whereas 42 U.S.C. § 1983 applies specifically to "person[s]." *Id.* Only "employers," not individuals acting in their individual capacity who do not otherwise meet the definition of "employers," can be liable under title VII.

Grant argues that *Clanton* is merely an example of the longstanding practice of treating public officials differently from private citizens. This argument does not square with the rationale of *Clanton,* which relies upon the language of title VII, contrasting it with § 1983's creation of a right to damages against "persons." The public employees in *Clanton* were excluded from liability because title VII does not include non-employer individuals, regardless of

whether they work for a private or public body. *Id.*

In *Harvey v. Blake,* 913 F.2d 226, 227-28 (5th Cir.1990), we also implied that a title VII plaintiff cannot recover against a public employee in his individual capacity. *See also Weiss v. Coca-Cola Bottling Co.,* 772 F.Supp. 407, 411 (N.D.Ill.1991) (interpreting *Harvey* as holding supervisor liable as employer's agent only in official capacity), *aff'd,* 990 F.2d 333 (7th Cir.1993). In *Harvey* we also specifically rejected a reading of *Hamilton v. Rodgers,* 791 F.2d 439 (5th Cir.1986), that would permit personal liability for damages under title VII.

Other circuits have held that public employees may not be personally liable for backpay damages under title VII. In *Busby v. City of Orlando,* 931 F.2d 764, 772 (11th Cir. 1991), for instance, the court held that the

relief granted under title VII is "against the *employer,* not against the individual employees whose actions constituted a violation of [Title VII]." The court stated that the proper method for a plaintiff to recover under title VII is to sue the employer, either by naming the supervisory employee as agent of the employer or by naming the employer directly. *Id.* Nothing in *Busby* suggests that its rationale should be limited to the context of public employees.

The Ninth Circuit has also determined that public employees may not be assessed backpay liability under title VII. *Padway v. Palches,* 665 F.2d 965 (9th Cir.1982). The court noted that title VII identifies unlawful practices only by the employer, not officers or employees of the employer, and that backpay awards should be paid by the employer. *Id.* at 968.

In *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 584 (9th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1049, ___ L.Ed.2d ___ (1994), the court extended this rule to private employers. Defendants were employees of a restaurant and its corporate owner. The plaintiff alleged that she was discriminated against because of her sex and age and sought to hold the defendants personally liable for their actions. The court rejected her claim, noting, "Because Congress assessed civil liability only against an employer under Title VII, . . . 'individual defendants cannot be held liable for back pay.' " *Id.* at 587 (quoting *Padway,* 6 65 F.2d at 968). The court also rejected the notion that "supervisory personnel and other agents of the employer are themselves employers for purposes of liability." *Id.*

The definition of the term "employer" in § 2000e(b) does not include individuals who do not otherwise qualify as employers under the statute. In *Miller,* the court observed that the purpose of the "agent" provision in § 2000e(b) was to incorporate *respondeat superior* liability into title VII. The court found no reason to stretch the liability of individual employees beyond the *respondeat superior* principle intended by Congress.

The court also noted that the statutory scheme of title VII indicated that Congress did not intend to impose individual liability on employees. Title VII limits liability to employers with fifteen or more employees, because Congress "did not want to burden small entities with the costs associated with litigating discrimination claims" and wanted "to protect small entities with limited resources from liability." *Id.* Thus, the

court found it inconceivable that Congress intended to allow civil liability to run against individual employees," the smallest of legal entities. *Id.* Finally, the *Miller* court suggested that had Congress envisioned liability for non-employer natural persons, it would have included it in its recent amendments to title VII under the Civil Rights Act of 1991. *Id.* at 587 n. 2.

We find no reason to limit the rationale of *Clanton* and *Harvey v. Blake* to the realm of public employee disputes. Thus, we conclude that title VII does not permit the imposition of liability upon individuals unless they meet title VII's definition of "employer."

B.

The structure of title VII also indicates that Congress did not intend natural persons who are not employers to be held

liable for backpay awards. Section 2000e-2 prohibits various types of discrimination by an "employer." The statute defines an employer to include any agent of an employer. *Id.* at § 2000e(b). Damages available under title VII include reinstatement with or without backpay and are to be paid by the employer, employment, agency, or labor organization responsible for the unlawful employment practice. 42 U.S.C. § 2000e-5(g)(1).

Murray contends that the type of damages available under title VII indicates that individual employees who are not employers are not intended to be held responsible for backpay damages. For instance, under title VII, equitable damages, including reinstatement and back pay, are recoverable. These types of damages can be obtained only from the employer. *See Weiss,* 772 F.Supp. at 411.

Grant contends that an agent with authority to hire, fire, and discipline also has the power of reinstatement, promotion, and correction of employment records. She concludes that all remedies available under the act should apply to those with the full power to act in the stead of the principal employer. Her contention proves too much. Not all agents have the power to hire and fire, yet title VII contemplates employer liability for their behavior because they are agents. Thus, Grant's reading would require us to treat some employees as both an employer and an employee. We reject this illogical reading. Instead, as the Ninth Circuit noted in *Miller,* title VII contemplates liability for the employer, which has the ability to discipline the employee. *Miller,* 91 F.2d at 588.

The absence, from the list of potentially liable parties, of individuals who do not otherwise meet the requirements of a title VII employer also suggests that Congress did not intend to include such natural persons. Among the various parties subject to liability listed in § 2000e-5(g)(1), Congress could have made the individual employee committing or engaging in the discriminatory acts liable for damages. It did not. In § 2000e-2, Congress could have provided that an individual employee is prohibited from engaging in discriminatory conduct. Instead, only an individual meeting the definition of "employer" is so prohibited.

As we have noted, Congress has proscribed conduct by "persons" in other statutory schemes. *See* 42 U.S.C. § 1981, 1983, 1985, 1986. The absence of specific language making a non-employer individual liable for

these damages, when Congress has included such language in other contexts, indicates that Congress did not intend to impose individual liability for backpay damages under title VII, unless the individual meets the statutory definition of "employer." In sum, there is no indication anywhere in title VII that Congress intended to impose individual liability in such a circumstance.

III.

Based upon analogous caselaw and the structure of title VII, we conclude that individuals who do not otherwise qualify as an employer cannot be held liable for a breach of title VII. Because the district court erroneously held Murray liable for damages in his individual capacity, we REVERSE the judgment against him, as well as the attorneys' fees award, and RENDER judgment in favor of Lone Star.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-89-2018

PAULA JO GRANT LANDRY,
Plaintiff

v.

LONE STAR COMPANY, B. L. WATSON, M. A. PETSCH, EDWARD C. THOMAS, JAY CLAYTON, BEN A. LANFORD, JR., MITCHELL L. MURRAY, KEITH OVERSTREET, WILLIAM P. MIDDLETON, DENNIS THOMLINSON, and TOMBO S. FAVER,
Defendants.

FINAL JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Sim Lake, United States District Judge, presiding, and the issues arising under Plaintiff's claim pursuant to Title 42, United States Code, Section 2000e, et seq., having been duly tried by the Court and the Court having rendered its findings of fact and conclusions of law with respect to such claim in the

records of this proceeding, and the Plaintiff's claims pursuant to the common laws of the State of Texas having been duly tried and submitted to the jury, and the jury having duly rendered its verdict on the state law claims,

It is hereby ORDERED AND ADJUDGED that the Plaintiff, PAULA JO GRANT LANDRY, recover of the Defendants MITCHELL L. MURRAY and TOMBO S. FAVER, jointly and severally, the sum of Fourteen Thousand Six Hundred and no/100 ($14,600.00) Dollars, plus interest thereon at the rate of 3.13% from the date of judgment until paid in full.

It is further ORDERED AND ADJUDGED that Plaintiff's counsel, MARY L. SINDERSON, recover of the Defendants MITCHELL L. MURRAY and TOMBO S. FAVER, jointly and severally, the sum of Sixty-two Thousand Five Hundred and no/100 ($62,500.00) Dollars, as attorn-

ey's fees, plus interest thereon at the rate of 3.13% from the date of judgment until paid in full, and the sum of Four Thousand Six Hundred Seventy-Eight and 74/100 ($4,678.74) Dollars, as expenses, plus interest thereon at the rate of 3.13% from the date of judgment until paid in full.

The Plaintiff shall take nothing as to Defendants B. L. WATSON, M. A. PETSCH, EDWARD C. THOMAS, JAY CLAYTON, BEN A. LANFORD, JR., and DENNIS THOMLINSON, and this action is dismissed with prejudice as to each of them. All relief not expressly granted herein is denied.

SIGNED at Houston, Texas this 22nd day of September, 1992. [1]/

/s/ SIM LAKE
UNITED STATES DISTRICT JUDGE

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[1]/ The above Final Judgment was entered on the court's docket on September 23, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-89-2018

PAULA JO GRANT LANDRY,
Plaintiff

v.

LONE STAR COMPANY, B. L. WATSON, M. A. PETSCH, EDWARD C. THOMAS, JAY CLAYTON, BEN A. LANFORD, JR., MITCHELL L. MURRAY, KEITH OVERSTREET, WILLIAM P. MIDDLETON, DENNIS THOMLINSON, and TOMBO S. FAVER,
Defendants.

ORDER

Came on this day for consideration Defendant MURRAY's Motion to Alter and/or Amend Judgment in the above-styled matter. After due consideration of the matters presented therein, this Court is of the opinion that Defendants' Motion is meritorious and should be in all things GRANTED.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Judgment against Mitchell L.

Murray, entered on September 23, 1992 shall be altered and Plaintiff's back pay award shall be changed from $14,600.00 to $5,905.00 plus interest thereon at the rate of 3.13% from the date of judgment until paid in full.

SIGNED this 17th day of December, 1992. [1]/

/s/ SIM LAKE
UNITED STATES DISTRICT JUDGE

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[1]/ The above Order was entered on the court's docket on December 18, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. NO. H-89-2018

PAULA JO GRANT LANDRY,
Plaintiff

v.

LONE STAR COMPANY, B. L. WATSON, M. A. PETSCH, EDWARD C. THOMAS, JAY CLAYTON, BEN A. LANFORD, JR., MITCHELL L. MURRAY, KEITH OVERSTREET, WILLIAM P. MIDDLETON, DENNIS THOMLINSON, and TOMBO S. FAVER,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW [1]

* * * * *

"Pursuant to Federal Rule of Civil Procedure 52(a), I make the following findings of facts and conclusions of law orally at the conclusion of all the evidence. To the extent that any finding of fact is more properly characterized as a conclusion of

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[1] The above findings and conclusions were given orally by the Trial Court on June 18, 1992 at the conclusion of trial and after the verdict of the jury on the common law claims.

law, I adopt it as such, to the extent that any conclusion of law is more properly characterized as a finding of fact, I adopt it as such.

First, I adopt all of the admissions of fact in the Amended Joint Pretrial Order as findings of fact of the Court.

In addition I make the following findings of fact:

One: From May of 1985 until plaintiff's employment was terminated, Mitchell L. Murray was manager of the Houston branch of Lone Star Company where the plaintiff was employed. Mr. Murray had the authority to hire and fire personnel in the Houston branch, and had disciplinary responsibility for the employees in that office.

Two: Defendants Watson, Petsch, and Lanford controlled the majority of the shares of stock in the corporation and set

the policy for the corporation and supervised the operations of the corporation.

Three: During 1987 and 1988 William P. Middleton was plaintiff's immediate supervisor in the Houston branch of corporation. At that time he made daily assignments to the plaintiff, evaluated her performance, and was involved in her sales incentive programs.

Four: At all times during plaintiff's employment with Lone Star Company, Mr. Tombo S. Faver was a manager in the Houston office.

Five: During the plaintiff's employment plaintiff was subjected to frequent sexual harassment by co-workers and supervisors of Lone Star Company. This harassment extended beyond 300 days before of [sic] the filing of her charge, but also continued within the filing within 300 days

immediately prior to the filing of her charge. The harassment took the form of the sexually explicit jokes and cartoons, comments about the plaintiff's body, clothing, and personal appearance, lewd comments, and suggestive noises, all of which had the effect of making the plaintiff the center of male attention because of her gender.

Six: In addition, sexually explicit language, jokes, and remarks were directed at other female employees at the Houston branch office.

Seven: Pictures of nude women, including an employee of the Houston branch, were posted on the walls of the Houston branch, and were passed around among employees, including supervisors.

Eight: Visitors to the premises of the Houston branch were permitted to make

sexually explicit jokes at sales meetings with the approval of the defendant Murray.

Nine: The plaintiff was subjected to descriptions of sexual conduct by fellow employees and supervisors while employed at Lone Star Company.

Ten: The plaintiff was subjected to sexually suggestive conduct by male employees while employed at Lone Star Company.

Eleven: Plaintiff was subjected to crude hostile and intimidating remarks which were belittling to women in general, and to her in particular, while employed at Lone Star Company.

Twelve: The plaintiff was subjected to verbal harassment on one or more occasions by the defendant Mitchell L. Murray.

Thirteen: Defendant Murray made sexual jokes and belittled women at the Lone

Star office, engaged with other employees in making sexually suggestive comments about and to women, and when plaintiff made complaints of sexual harassment was unresponsive to them.

Fourteen: Keith Overstreet, who was formerly the plaintiff's supervisor, frequently made sexual gestures, overtures, and demands for sexual favors from employees of the Houston branch of Lone Star Company.

Fifteen: Plaintiff was not subjected to verbal harassment by defendant Dennis Thomlinson.

Sixteen: Plaintiff was subject to verbal harassment on one or more occasions by defendant Tombo S. Faver, in addition, plaintiff was subjected to physical harassment on one or more occasions by defendant Faver. This harassment involved unwelcome or unpro-

voked physical contact, or the threat of physical contact.

Seventeen: The incidents of sexual harassment and gender discrimination in the Houston branch of the Lone Star office frequently took place in the presence of supervisors who did nothing to correct such conduct. The conduct of Overstreet, Faver, and Murray described above occurred as a part of the course and scope of their employment with Lone Star Company.

Seventeen [sic]: Lone Star Company had no effective procedure for making complaints about sexual harassment prior to the termination of the plaintiff's employment.

Eighteen: Female employees at the Houston branch of Lone Star Company were subjected to derogatory and insulting language, which indicated hostility towards females. The conditions at the Houston

branch amounted to a hostile work environment for women, and a pervasive atmosphere of sexual discrimination against women.

Nineteen: Defendants Lanford, Thomlinson, Thomas, and Clayton did not participate in sexually discriminatory conduct against plaintiff, or engage in any act that created a hostile work environment at the Houston office of Lone Star Company.

Twenty: On August 30, 1988, plaintiff made a formal charge of sexual harassment to the Equal Employment Opportunity Commission.

Twenty-one: The physical and psychological effects of the conduct to which plaintiff was subjected while employed at Lone Star Company adversely affected her well-being and work performance.

Twenty-two: This plaintiff resigned her employment on October 10th,

1988, effective October 14th, 1988. Her resignation was involuntary, due to the extreme hostility and sexually discriminatory work environment in the Houston branch of Lone Star Company. After her involuntary resignation, and before Lone Star filed for bankruptcy, the plaintiff lost wages in the amount of $14,650. I calculate this as 20 months at a rate of $1650 per month, less the $15,300 that she earned in 1989, and less $3,050 that she earned in 1990. The evidence shows that in 1990 the plaintiff earned $7,320 working for three employers. The evidence is inadequate for me to determine in which months she earned that, so I have prorated the entire amount by dividing it by 12 and allocating one-twelfth of $7,320 to each of the months for which she is entitled to recover, that is five-twelfths for 1990.

Twenty-four: [2]/ Plaintiff's suit was timely filed.

Twenty-five: Lone Star Company is no longer doing business in Texas, therefore reinstatement of the plaintiff is not possible.

Conclusions of law.

One: Plaintiff is a person entitled to relief under Title VII of the Civil Rights Act of 1984. She has established by preponderance of the evidence the existence of a hostile and offensive work environment which was pervasively discriminatory against women in the Houston branch of Lone Star Company.

Two: Lone Star Company and Mitchell L. Murray were employers within the meaning of 42 U.S.C. Section 2000 (E) (b).

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[2]/ There is no item numbered twenty-three in the court-reporter's transcription of these oral findings of fact, although there are two items numbered seventeen.

Three: The conduct of defendants Murray and Faver constituted sexual harassment in violation of Title VII of the Civil Rights Act of 1964.

Four: The conduct of defendants Thomas, Clayton, Lanford, and Thomlinson did not constitute sexual harassment.

Five: An agent may be an employer under Title VII if he has some of the employer's traditional rights, such as hiring and firing other employees. Mr. Murray clearly meets this test. The evidence has not established that Mr. Faver meets this test. However, the evidence establishes that both Mr. Faver and Mr. Murray engaged personally in conduct discriminating against the plaintiff because of her sex, and which created an atmosphere of hostile environment against women such as the plaintiff. I find that Mr. Murray is not liable as an employer,

because liability as an employer would only impose liability in his official capacity as a manager, and I am persuaded that the better reasoned authority establishes that liability as an employer against a supervisor or manager only exists in the supervisory employee's official capacity, not his individual capacity, because the supervisor or manager has no authority to reinstate the plaintiff or pay back wages, or provide any of the other traditional equitable remedies which Title VII provides as remedies against an employer. Although defendant Murray can not be personally liable for the harassment that occurred at the December, 1986, Christmas party, because it occurred more than 300 days before the plaintiff filed her E.E.O. charge, he can be personally liable because he participated directly in engaging in acts, and in addition in condoning and encouraging the acts of

other workers, including Overstreet and Faver, that contributed to a hostile work environment.

Six: Defendants Thomas, Clayton, Lanford, and Thomlinson are not personally liable to plaintiff because they did not participate in any of the conduct that created a hostile or offensive environment in the Houston office.

Seven: The conduct of the employees of the Houston branch office of Houston Lone Star Company created a pervasive atmosphere of sexual discrimination which affected a term or condition of plaintiff's employment in violation of Title VII of the Civil Rights Act of 1964 as amended.

I will enter judgment jointly and severally against defendants Faver and Murray for $14,650, plus plaintiff's reasonable attorney's fees.

I find that the liability here should be joint and several, because there is no way feasibly to apportion individual liability between the two defendants for the conduct that I have found resulted in their liability."

* * * * *

FILED
NOV 4 1994

No. 94-365

In The

Supreme Court of the United States

October Term, 1994

PAULA JO GRANT,

Plaintiff/Petitioner,

v.

LONE STAR COMPANY, ET AL.,

Defendants,

and

MITCHELL L. MURRAY,

Defendant/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED

1. Whether back pay damages can be awarded against an employee in his individual capacity under Title VII of the Civil Rights Act of 1964, as amended?

2. Whether a trial court can use the grant of equitable power contained in 42 U.S.C. § 2000e-5(g)(1) to award back pay damages against an employee in his individual capacity?

3. Whether there exists a conflict in the decisions among the United States Circuit Courts of Appeals regarding whether back pay damages can be awarded against an employee in his individual capacity requiring resolution by this Honorable Court?

LIST OF PARTIES

Paula Jo Grant Landry	Plaintiff/Appellee/Petitioner
Mitchell Murray	Defendant/Appellant/Respondent

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OPINIONS BELOW

Petitioner for the most part accurately recites the opinions below in this case. However, certain matters germane to the disposition of the Petition were not included. Specifically, the trial court's complete statement for the record constituting its findings of fact and conclusions of law was not contained in Petitioner's Appendix because the trial court's findings regarding Petitioner's trust fund theory were not contained therein. Additionally, the jury verdict on Petitioner's trust fund theory was not contained in the Appendix to the Petition. Respondent includes these matters in his Appendix. *See* App. 1-7.

JURISDICTION

Respondent agrees with the jurisdictional statements made in Petitioner's Brief, except that Respondent asserts that no true conflict of decisions exists among the United States Circuit Courts of Appeals on the issue decided by the court below.

STATUTORY PROVISIONS

The key statutory provisions of Title VII at issue in this matter were adequately set forth in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

During the trial of this matter, Petitioner sought to recover damages from individual Defendants on her claims. Pursuant to this theory, Petitioner requested that the jury be instructed on a state law trust fund theory which would have permitted Petitioner to recover monies from certain Defendants in their individual capacities. Interrogatories were submitted to the jury regarding Petitioner's trust fund theory. Respondent was not included in these Jury Interrogatories. The jury found against Petitioner on the trust fund theory. App. 1-3. Following the return of the jury's verdict on this trust fund theory, the trial court also made findings on the trust fund theory. The trial court adopted the jury's findings and found against Petitioner on the trust fund theory. App. 4-7.

REASONS FOR DENYING WRIT

THE FIFTH CIRCUIT CORRECTLY CONCLUDED THAT CONGRESS DID NOT INTEND THAT BACK PAY DAMAGES UNDER TITLE VII BE AWARDED AGAINST EMPLOYEES IN THEIR INDIVIDUAL CAPACITY

Title VII of the Civil Rights Act of 1964, as amended, defines "employer" as any person engaged in interstate commerce with 15 or more employees and any *agent* of that employer. 42 U.S.C. § 2000e(b). Back pay damages under Title VII are payable by the *employer*, employment agency or labor organization responsible for the unlawful discrimination. 42 U.S.C. § 2000e-5(g)(1). Petitioner

asserts that these provisions of Title VII reflect a Congressional intent to hold employees in their individual capacity liable for back pay damages and that the Fifth and Ninth Circuit Courts of Appeals have erred in concluding otherwise.

Congress did not intend that employees in their individual capacity be liable for back pay damages under Title VII. Congress intended that the inclusion of "any agent" in the definition of "employer" incorporate the doctrine of *respondeat superior* into Title VII rather then impose individual liability on employees. Courts have found that the agent term was intended incorporate the doctrine of *respondeat superior*. *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 584 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 372 (1994). This *respondeat superior* intention is also reflected in the provision of 42 U.S.C. § 2000e-(5)(g)(1) which provides that back pay awards are payable by the employer *responsible* for the discriminatory actions. (Emphasis added.)

The notion that the inclusion of "any agent" in the definition of "employer" was meant to impose *respondeat superior* liability rather than individual liability is also reflected in Justice Marshall's concurring opinion in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). Justice Marshall discussed the notion of *respondeat superior* liability under Title VII. He observed that corporations and companies can only act through their supervisors and employees and, despite the realities of how Title VII violations occur, Title VII remedies such as reinstatement and back pay generally run against the employer as an entity. Further, the acts of supervisory employees and agents are imputed to the employer. *Id.* at 75. Justice

Marshall's comments indicate that the employing entity will be held liable for the acts of its agents and, conversely, that employees in their individual capacity are not liable for back pay damages. *See also* 29 C.F.R. § 1604.11(c),(d) (1985). (EEOC guidelines regarding sexual harassment liability only consider liability of employing entity for acts of agents, supervisory employees and co-workers but do not mention individual liability.)

This Honorable Court has determined that an analogous provision in the National Labor Relations Act was meant to incorporate the concept of *respondeat superior*. In *Packard Motor Co. v. National Lab. Rel. Bd.*, 330 U.S. 485 (1946), the Court reviewed the definition of "employer" under the National Labor Relations Act, which at that time defined employer as including any person acting in the interest of an employer. 29 U.S.C. § 152(2). The Court observed that the purpose of the definition was to render employers responsible for acts of persons performed in their interests. This definition was also an adaptation of the common law concept of *respondeat superior* into the NLRA. *Id.* at 489.

The structure of Title VII reflects a Congressional intent that employees cannot be held liable in their individual capacity for back pay damages. Under Title VII, employers are prohibited from engaging in discriminatory actions. *See* 42 U.S.C. § 2000e-2. Individuals are not. Under Title VII, back pay damages are to be paid by the employer, labor organization or employment agency responsible for discriminatory acts. This provision refers to entities, not individuals. Further, the very use of the term "agent" implies that the agent is acting on behalf of the employing entity and, therefore, not in an individual

capacity. *Cf. Sattar v. Unocal Corp.*, 829 F.Supp. 331 (N.D. Cal. 1993). ("Any agent" term in 42 U.S.C. § 2000e(b) defined as entity distinct from employer, not employee.) Finally, the type of damages authorized under 42 U.S.C. § 2000e-5(g) are of the type which are logically only awardable against the employing entity. *See Weiss v. Coca-Cola Bottling Co. of Chicago*, 772 F.Supp. 407, 411 (N.D. Ill. 1991).

Just as important as the specific provisions contained in Title VII is what is absent from Title VII. Congress did not include among the parties subject to liability under 42 U.S.C. § 2000e-5(g) the individual employee committing or engaging in discriminatory acts. Congress did not proscribe in 42 U.S.C. § 2000e-2 discriminatory conduct by an employee acting in his individual capacity. Congress could have but did not include within these provisions of Title VII a specific prohibition that an employee acting outside the scope of his employment is prohibited from engaging in discriminatory acts or that the employee will be held individually liable for back pay damages.

Congress' failure to specifically provide for individual liability is even more evidence of an intent not to hold employees individually liable under Title VII since Congress provided for liability against persons in other civil rights statutes. Title II of the Civil Rights Act of 1964 specifically provides that remedies can be levied against persons and persons responsible for illegal acts. *See* 42 U.S.C. § 2000a, *et seq.* Further, Congress has proscribed conduct by persons in other civil rights statutory schemes. *See* 42 U.S.C. §§ 1981, 1983, 1985, 1986. These statutes reflect that where Congress intended to provide

for individual or personal liability it said so in plain language. Congress' failure to specifically do so in Title VII reflects an intent that employees in their individual capacity not be liable for back pay damages.

Petitioner argues that liability should be extended to Repondent in his individual capacity because it would be her only remedy in this case since the corporate employer sold its assets and filed bankruptcy. Petitioner's argument is misplaced because she had a remedy; she could have litigated her claim against the corporate entity in the bankruptcy proceedings.[1] Title VII does not guarantee collection of a judgment. Permitting Title VII monetary remedies to extend to an individual employee based upon the collectability of a judgment against the employing entity would be illogical and would create the possibility of an inconsistent application of the back pay remedy provided in the statute because its application would depend upon the solvency, total or partial, of the employing entity.

Congress intended that the definition of "employer" contained in 42 U.S.C. § 2000e(b) incorporate *respondeat superior* liability. The inclusion of "and any agent" in the definition of "employer" prevents an employing entity from asserting that it is not liable for the conduct of its agents. Congress' intent is reinforced by Justice Marshall's concurring opinion in *Meritor Savings Bank v. Vinson, supra,* and the Court's opinion in *Packard Motor Co., supra.* Since Congress intended the definition of

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[1] **Additionally, as noted by the court below, Petitioner had remedies under state law available to her. Petitioner lost on these claims.**

"employer" to incorporate the notion of *respondeat superior*, employees were not intended through this provision to be held liable for back pay damages in their individual capacity. Had Congress intended to do so, it would have clearly said so.

COURTS DO NOT HAVE GENERAL EQUITABLE POWER TO AWARD BACK PAY DAMAGES AGAINST EMPLOYEES IN THEIR INDIVIDUAL CAPACITY UNDER TITLE VII

Petitioner asserts that the trial court's equitable powers could be exercised to levy a back pay award against Respondent in his individual capacity. Petitioner suggests that this can be done even if the employee/agent was not included within the statutory definition of an employer. The crux of Petitioner's second point is that, even if Title VII did not authorize an award of back pay against an employee in his individual capacity, the trial court could exercise its equitable powers to levy such an award.

Petitioner's point is not well founded. 42 U.S.C. § 2000e-5(g)(1) specifies the entities responsible for the payment of back pay damages. By specifically providing from whom this remedy is recoverable, the statute thereby precludes the court from levying that remedy against entities, including individuals, not listed in 42 U.S.C. § 2000e-5(g)(1).

Petitioner's suggestion that the trial court could levy an award of back pay against an employee in his individual capacity as an exercise of its equitable powers even if Title VII did not authorize such an award is contrary to

case law. In general, a court cannot exercise its equitable powers to grant relief outside of that authorized by the statute involved. *See INS v. Pangilinan*, 486 U.S. 875, 883-84 (1986). More specifically, courts may not grant through the use of their equitable powers a remedy which is not authorized by Title VII. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 576 n.9, 578-79 (1984).

NO TRUE CONFLICT OF DECISIONS EXISTS AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE PRESENTED IN THIS CASE

Petitioner asserts that the decision of the Court of Appeals for the Fifth Circuit below, as well as the decision of the Ninth Circuit in *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993), *cert. denied*, ___ U.S. ___, 127 L.Ed.2d 372 (1994), conflicts with the decisions of other circuit courts of appeals on the issue of the liability for back pay awards of employees in their individual capacity. However, a review of the decisions cited by Petitioner indicates that no true conflict exists between the Fifth Circuit's decision below, the Ninth Circuit's decision in *Miller, supra,* and the cases cited by Petitioner.

Petitioner cites a series of cases asserting that they establish a conflict between this case and other cases regarding individual liability. *See Glus v. G.C. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977); *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980); *Eggleston v. Chicago Journeymen Plumber's Local Union No. 130, U.A.*, 657 F.2d 890 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Romain v. Kurek*, 836 F.2d 241 (6th Cir. 1987); *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir 1986); *Greenwood v. Ross*, 778

F.2d 448 (8th Cir. 1985); *Sedlacek v. Hach*, 752 F.2d 333 (8th Cir. 1985). However, a simple reading of these cases reflects that not one of them specifically considered and actually determined the issue of individual liability under Title VII or an award of back pay damages against employees in their individual capacity.

The Fourth Circuit's opinion in *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1990), *modified on other grounds*, 900 F.2d 227 (4th Cir. 1990), also does not truly conflict with the Fifth Circuit's decision below or the decision in *Miller, supra*. Specifically, *Paroline* involved the consideration on appeal of a summary judgment granted to the defendant/corporation and the employee/manager. The summary judgment was not based upon the claim that an individual cannot be personally liable for back pay damages under Title VII. The issue of whether an individual could be personally liable for back pay damages under Title VII was not presented to the Fourth Circuit for determination. The Fourth Circuit did not reverse the grant of the summary judgment on the basis that an individual could be held liable for back pay damages under Title VII. These were the issues specifically addressed in both the Fifth Circuit's decision below and *Miller, supra*. As a result, no true conflict in decisions exists which would warrant the grant of a writ of certiorari in this case.

Additionally, this Court has recently denied a petition for writ of certiorari based upon Petitioner's exact same argument citing some of the same cases. Specifically, in the Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the petitioner in *Miller, supra,* the petitioner specifically

requested that writ of certiorari be granted because the Ninth Circuit's decision conflicted with the decisions of other circuit courts. The petitioner asserted that the Ninth Circuit's decision conflicted with *Paroline, supra,* and *Jones v. Continental Corp., supra.* This Court denied the petition for writ of certiorari. Petitioner herein cites no cases which have arisen since the denial of the petition for writ of certiorari in *Miller, supra,* which establish a conflict with either the Fifth Circuit's decision below or *Miller, supra.*

THE PRESENT MATTER IS, BECAUSE OF OTHER FACTORS, NOT APPROPRIATE FOR THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI

In addition to the reasons indicated above, there are other factors about this case which make granting the petition for writ of certiorari inappropriate. These factors are such that the petition for writ of certiorari should be denied.

(1) SPECIFIC CONCLUSIONS OF LAW RENDERED BY TRIAL COURT PRECLUDE AWARD OF DAMAGES AGAINST RESPONDENT

As previously indicated, the trial court issued findings of fact and conclusions of law in this matter. However, certain findings of the court preclude any liability for back pay damages against Respondent Murray in his individual capacity. In Conclusion of Law No. 5, the court specifically stated that "I find that Mr. Murray is not liable as an employer, . . . " *See* Petition for Writ of Certiorari, A-34. Since 42 U.S.C. § 2000e-5(g)(1) provides

that back pay is to be paid by the employer responsible for the illegal discrimination, the trial court's specific conclusion that Respondent was not liable as an employer bars any award of back pay damages against him.

(2) FAILURE OF PETITIONER TO NAME MURRAY AS A RESPONDENT IN CHARGE OF DISCRIMINATION BARS ANY AWARD AGAINST HIM

42 U.S.C. § 2000e-5(f)(1) specifically provides that, within 90 days after the giving of a notice of right to sue, a civil action may be brought against the respondent named in the charge. Therefore, in order for any person to be subject to liability under Title VII, that person must first be named a respondent in a charge of discrimination filed with the United States Equal Employment Opportunity Commission.

In the present case, it is undisputed that Petitioner did not name Murray as a respondent in the charge of discrimination she filed with the EEOC. The only evidence admitted by the court on this issue was the actual charge filed with the EEOC and it is undisputed that Murray was not named in that charge. Petitioner attempted to introduce into evidence her affidavit submitted with her charge of discrimination, but it is undisputed that the court did not admit the affidavit into evidence. Petitioner did not challenge that evidentiary decision as error on appeal. As a result, Petitioner's statements regarding what is contained in the affidavit are immaterial, irrelevant, and inappropriate. Since the only evidence in the record of this case establishes that Murray was not named in the charge of discrimination and was

not a named respondent in the charge, the language of Title VII establishes that no damages can be levied against him.

(3) THE FINDINGS OF THE JURY AND COURT PRECLUDE THE IMPOSITION OF INDIVIDUAL LIABILITY AGAINST RESPONDENT

Assuming, *arguendo*, that the inclusion of "any agent" in the definition of "employer" authorizes an award of back pay damages against an employee in his individual capacity, the question to be answered would be: What standard for assessing individual liability under the damages provision of Title VII should apply? The likely place for guidance on a standard for assessing such individual liability would be Section 10(c) of the National Labor Relations Act. 29 U.S.C. § 160(c). Since the back pay provision of Title VII was modeled after that provision, it is appropriate to look to interpretations of this section of the NLRA for guidance on the scope of 42 U.S.C. § 2000e-5(g)(1) as it pertains to the possible award of back pay damages against an employee in his individual capacity. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 (1975); *Barbara Lindemann Schlei & Paul Grossman, Employment Discrimination Law*, 1418 n.2 (2nd Ed. 1983).

Under 29 U.S.C. § 160(c), the general rule is that a stockholder will not be held individually liable for back pay damages. The insulation of the stockholder from obligations of the corporation is the norm and not the exception. *See NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402-03 (1960); *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1051 (10th Cir. 1993). Under the NLRA, back pay

damages are generally only assessed against individuals where the corporate structure is employed to perpetuate fraud, evade existing obligations or circumvent a statute. *See Concrete Manufacturing Co.*, 262 NLRB 727, 110 LRRM 1353 (1982); *Riley Aeronautics Corp.*, 178 NLRB 495, 501, 74 LRRM 1543 (1969). Decisions under the NLRA generally only impose individual liability for back pay where the owner is engaged in outrageous conduct including receiving money from escrow accounts established for disbursements to creditors, converting company assets to their own use, or acting to hinder, delay or defraud board orders. *See e.g. Concrete Manufacturing Co.* supra, *Cera International Corp.*, 272 NLRB No. 209, 117 LRRM 1490 (1984); *F & W Oldsmobile, Inc.*, 272 NLRB No. 184, 117 LRRM 1478 (1984).

The findings of the jury and the court do not support, under these authorities, imposition of any liability against Respondent in his individual capacity. The court did not find that Respondent was a stockholder or controlling shareholder of the employing entity. Both the court and the jury found against the Petitioner on her trust fund theory of liability, which would have been the only way Petitioner could have argued that she could recover damages from employees in their individual capacity under the authorities cited above. Therefore, to the extent that decisions under the National Labor Relations Act provide the standard for the determination of individual liability under 42 U.S.C. § 2000e-5(g)(1), if such liability is even authorized, the jury findings and findings of fact establish that Respondent cannot be held individually liable for Petitioner's back pay damages. *See*

NLRB v. Greater Kansas City Roofing, 2 F.3d 1047 (10th Cir. 1993) (enforcement denied).

CONCLUSION

Respondent, Mitchell Murray, respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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(210) 246-5000
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Attorney of Record
for Respondent
Mitchell L. Murray

November 4, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAULA JO GRANT LANDRY, Plaintiff, v. LONE STAR COMPANY, B.L. WATSON, M.A. PETSCH, EDWARD C. THOMAS, JAY CLAYTON, BEN A. LANFORD, JR., MITCHELL L. MURRAY, KEITH OVERSTREET, WILLIAM P. MIDDLETON, DENNIS THOMLINSON, and TOMBO S. FAVER, Defendants.	§ § § § § § § § § § § § § § § §	CIVIL ACTION NO. H-89-2018

SPECIAL INTERROGATORIES

(Filed JUN 18, 1992)

SPECIAL INTERROGATORY NO. 1

Do you find, from a preponderance of the evidence, that any one or more of the Defendants listed below engaged, recklessly or intentionally, in extreme and outrageous conduct with the intent to inflict severe emotional distress upon Paula Jo Grant Landry?

Answer "Yes" or "No" opposite the names of the Defendants listed below:

ANSWER: Tombo S. Favor No
Mitchell L. Murray No

* * *

If you answered "Yes" as to any one or more of the Defendants listed in Special Interrogatory No. 13, then answer Special Interrogatory No. 14; otherwise, do not answer Special Interrogatory No. 14.

SPECIAL INTERROGATORY NO. 14

Do you find from a preponderance of the evidence that Lone Star Company became insolvent and ceased to do business and that one or more of the Defendants named below received assets from Lone Star Company or appropriated assets to himself?

Answer "Yes" or "No" as to each Defendant listed below.

ANSWER:	B. L. Watson	No
	M. A. Petsch	No
	Ben A. Lanford, Jr.	No

If you answered "Yes" as to any one or more of the Defendants listed in Special Interrogatory No. 14, then answer Special Interrogatory No. 15 as to each such Defendant; otherwise, do not answer Special Interrogatory No. 15.

SPECIAL INTERROGATORY NO. 15

What amount of assets of Lone Star Company did the Defendants listed below receive or appropriate from Lone Star Company?

Answer in dollars and cents as to each Defendant listed below.

ANSWER:	B. L. Watson	$0
	M. A. Petsch	$0
	Ben A. Lanford, Jr.	$0

June 18, 1992
Date

/s/ James W. Meek
Foreperson

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PAULA JO GRANT Plaintiff vs. B. L. WATSON, M. A. PETSCH EDWARD C. THOMAS JAY CLAYTON BEN A. LANFORD, JR. MITCHELL L. MURRAY DENNIS THOMLINSON TOMBO S. FAVER Defendants	CIVIL NO. 89-CV-2018 Houston, Texas June 18, 1992 8:30 a.m.

VOLUME VI

TRIAL

BEFORE THE HONORABLE SIM LAKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	MARY L. SINDERSON Attorney at Law 2990 Richmond Ave., Suite 205 Houston, Texas 77098-3109
For the Defendants Watson, Petsch, Thomas, Clayton, Lanford, Murray, and Thomlinson:	CYNTHIA GLASS BIVINS and JOHN FRANCO Attorneys at Law 1800 Frost Bank Tower San Antonio, Texas 78205

Court Reporter: WILLA J. FARIS, R.P.R.
Official Court Reporter
United States District Court
515 Rusk, Room 8032
Houston, Texas 77002
(713) 250-5034

[p. 966] THE COURT: Be seated, sir.

First of all, in the event that Special Interrogatories 14 and 5 are subsumed within my jurisdiction as a fact-finder under Title VII, I make the following findings under Rule 52 of the Federal Rules of Civil Procedure.

I find that neither Mr. Watson, Mr. Petsch, or Mr. Lanford – let me restate that – I find that a preponderance of the evidence does not establish that Lone Star Company became insolvent and ceased to do business, and that [p. 967] either Mr. Watson, Mr. Petsch, or Mr. Lanford received assets from Lone Star Company or appropriated assets to themselves.

I'm satisfied that all the remuneration that each of these defendants received was in the ordinary course of business as an employee, and with respect to Mr. Watson was incident to a routine agreement whereby he agreed not to compete with Quality Beverage.

Therefore I would find "No" with respect to each of those elements. All right.

* * *

[p. 992] I find that the liability here should be joint and several, because there is no way feasibly to apportion individual liability between the two defendants for the conduct that I have found resulted in their liability.

Plaintiff will furnish – plaintiff's counsel will furnish to defendants' counsel and to Mr. Faver within 10 business days an itemization of her fees and expenses, and any additional factors which she believes justify additional fee under Johnson versus Georgia Highway Express.

Defendant will have 10 days to respond with respect to the accuracy of the fees and expenses.

Hopefully, the parties can agree on the plaintiff's attorney's fees. I'm uncertain in this case whether the plaintiff is entitled to a full recovery since the plaintiff was unsuccessful on a substantial amount of the relief sought, [p. 993] both Title VII relief against many of the defendants and tort relief against all of the defendants. But I'm unclear because I haven't had a chance to review the law what apportionment would be appropriate, and I would hope that the parties could agree on that. If not, send to me in chambers within 30 days your positions on attorney's fees and a proposed form of judgment, and I will schedule a hearing on the attorney's fees.

MS. SINDERSON: Yes, sir. Your Honor, may I request one additional factual finding?

THE COURT: What?

MS. SINDERSON: And that is with respect to the majority ownership in your factual finding, Watson, Petsch, and Lanford I believe we also need Mr. Clayton to constitute a majority.

THE COURT: I didn't find that he was involved, I know you had him in there, but I don't find –

MS. SINDERSON: I understand that, but I thought that finding just went to who controlled the majority.

THE COURT: No. I don't think it's relevant in any event, because I found no liability against him, and because both I and the jury have found against you on the trust fund theory.

Anything else, Miss Bivins?

MS. BIVINS: No, sir.

THE COURT: All right.

* * *